

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

IRA KAREEM HOLMES,

Defendant-Appellant

UNPUBLISHED

March 11, 2003

No. 235213

Genesee Circuit Court

LC No. 00-006710-FH

Before: Meter, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of five counts of uttering and publishing, MCL 750.249, and sentenced, as an habitual offender, to five concurrent sentences of fourteen to twenty-eight years' imprisonment. He now appeals his sentences as of right. We affirm.

On appeal, defendant first argues that he is entitled to resentencing because the trial court erred in scoring offense variables (OV) 9 and 14. A reviewing court examines challenges to the sentencing guidelines score for an abuse of discretion. *People v Cain*, 238 Mich App 95; 605 NW2d 28 (1999). "Appellate review of guidelines calculations is limited, and a sentencing court has discretion in determining the number of points to be scored provided there is evidence on the record that adequately supports a particular score." *Id.* at 129-130.

In this case, defendant was assessed ten points for OV 9 (number of victims). Under OV 9, ten points are assessed only if there are between two and nine victims of a particular offense. The instructions to OV 9 state that "each person who was placed in danger of injury or loss of life" constitutes a victim. At sentencing, trial counsel for defendant objected to the probation officer totaling the number of victims of the multiple convictions, rather than examining each conviction separately. Specifically, trial counsel argued that OV 9 should be scored zero points because there was only one victim in each of five cases. In opposition, the prosecutor argued that there were at least two victims for each count of uttering and publishing, including "the persons that the defendant dealt with directly . . . as well as the bank." In ruling on the objection, the trial court upheld the scoring of ten points on OV 9, reasoning that "[a] banking institution can be a victim" and that "[t]he individuals who were involved likewise are victims."

As this Court noted in *People v Chesebro*, 206 Mich App 468, 472-473; 522 NW2d 677 (1994), addressing the predecessor provision of OV 9, the trial court is to consider offenses other than the offense for which the defendant was convicted only if the instructions specifically and

explicitly direct the trial court to do so. Because OV 9 does not direct the trial court to consider other offenses than the offense for which defendant was convicted, he could not be scored for multiple victims in distinct offenses. Though convicted of five counts of uttering and publishing, defendant could, thus, be scored under OV 9 only for the number of victims for each particular conviction.

However, contrary to defendant's claim, there were two victims in each of the five convictions for uttering a forged cashier's check with the intent to defraud. Here, each person who received a forged check is a victim. Moreover, in addition to the each victim who received a forged check, the trial court properly regarded the F& M Bank in Wisconsin as a victim in each offense. Although defendant maintains that F&M Bank was not a victim in each separate case because it did not face "any real risk of a financial loss due to the fraudulent use of the stolen check," plaintiff correctly notes that OV 9 does not require the injury or loss to be financial in nature. Here, the cashier checks were stolen while en route to the bank. Thus, under the circumstances, the trial court did not abuse its discretion in determining that there was sufficient evidence to regard F&M Bank as a victim in each offense.

Accordingly, the trial court did not err in scoring ten points for OV 9 because it properly concluded that there were two victims in each offense: the individual who received a forged cashier's check and F&M Bank.

The trial court also did not err in scoring ten points for OV 14 on the basis of defendant's role as a leader in these offenses. *People v Hack*, 219 Mich App 299, 313-314; 556 NW2d 187 (1996); *People v Johnson*, 202 Mich App 281, 289-290; 508 NW2d 509 (1993). As plaintiff points out, the record indicates that defendant told the police that he directed Joshua McPherson to deposit a check for \$35,000 and to keep \$5,000 for himself. Considering the entire criminal episode, there was sufficient evidence to support the trial court's scoring ten points for OV 14.

Defendant also contends that the trial court failed to articulate sufficient and legitimate substantial and compelling reasons for deviating from the sentencing guidelines. In this case, the sentencing guidelines recommended a minimum sentence of nineteen to seventy-six months' imprisonment for each conviction for uttering and publishing. Departing from the guidelines, the trial court sentenced defendant to fourteen to twenty-eight years' imprisonment on each conviction.

Because the offenses with which defendant was charged occurred after January 1, 1999, the legislative sentencing guidelines apply. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). With the enactment of the new sentencing guidelines, the Legislature developed legislative guidelines for habitual offender sentences. MCL 769.34; *People v Babcock*, 244 Mich App 64, 72; 624 NW2d 479 (2000). A court may depart from the legislative guidelines if it has substantial and compelling reasons to do so, and states those reasons on the record. MCL 769.34(3). *People v Hegwood*, 465 Mich 432, 440; 636 NW2d 137 (2001). A court may not depart from the legislative sentencing guidelines based on certain specified factors, including gender, race, ethnicity, national origin, and lack of employment, MCL 769.34(3)(a), nor may it base a departure on an offense characteristic or offender characteristic already considered in determining the guidelines range unless the court finds, based on facts in the court record, that the characteristic was given inadequate or disproportionate weight, MCL 769.34(3)(b).

In reviewing a departure from the legislative guidelines range, the existence of a particular factor is a factual determination this Court reviews for clear error, the determination that the factor is objective and verifiable is reviewed as a matter of law, and the determination that the factors constituted substantial and compelling reasons for departure is reviewed for abuse of discretion. *Babcock, supra*, 244 Mich App at 75-78.

In this case, defendant, who had three prior felony convictions, was convicted of five counts of uttering and publishing. As the trial court noted at sentencing and on the departure evaluation form, defendant had committed eight felonies within six years. Because the sentencing guidelines took into account only three of defendant's eight prior felony convictions and only two of the instant convictions, the trial court properly considered defendant's criminal background as a substantial and compelling reason to depart from the sentencing guidelines. Further, as the trial court noted at sentencing, previous attempts to rehabilitate defendant had failed. The trial court also noted on the departure evaluation form that defendant, while incarcerated, had fifteen misconduct citations. Finally, the trial court properly took into account the fact that defendant, by giving untruthful testimony at trial, had not accepted responsibility for his actions. Considering defendant's extensive criminal history and recognizing the need to protect the community from him, the trial court did not abuse its discretion in departing from the guidelines in this case. See *People v Cervantes*, 448 Mich 620, 635; 532 NW2d 831 (1995).

Affirmed.

/s/ Patrick M. Meter
/s/ Kathleen Jansen
/s/ Michael J. Talbot